under an agreement submitted to the Telecommunications Division in Advice Letter 18115, that would result in 0.95 cents compensation per page (less than Trout's cost estimate).

Pacific's witness Scholl testified that Trout's cost study was flawed and that after making adjustments, a more appropriate estimate would be from 0.006 to 0.088 cents per page depending on the type of paging terminal used and on the capacity assumptions for that paging terminal. Scholl argues that Trout's study did not conform to the consensus costing principles established in D.95-12-016. Scholl's adjustments exclude costs associated with paging transmitters and with the facilities that link the transmitters with the paging terminal. Scholl argues that these portions of the paging network are not traffic-sensitive and therefore should not be included in the TSLRIC of termination just as local loop facilities are not included the TSLRIC of termination in the wireline context. Also, Scholl attempts to eliminate costs that are not directly associated with paging service, such as voice features. Additionally, Scholl argues that Pacific should not have to compensate Cook for traffic sent over Type 1 (end-office) interconnections because Pacific avoids no costs by sending traffic that way.

We share Pacific's concerns that Cook has not submitted an acceptable cost study which is consistent with our adopted consensus costing principles adopted in D.95-12-016. Pacific's argument to limit the cost study to paging-specific features, to traffic originated by Pacific, and to traffic-sensitive elements is compelling. We are also concerned that Cook's study used a terminal which had excess capacity. Cook's cost study does not convince us to adopt the termination rates negotiated by Pacific Bell and Pac-West Telecom nor those rates established in arbitrations between Pacific and wireline CLCs as reasonable approximations of Cook's additional costs of termination. Furthermore, although we are not bound by the FCC's determination

on this issue, we note that First Report and Order presumes that a paging company's additional costs of termination would be less than those of the incumbent LEC, warns against the economic harm of imposing a rate based on the LEC's costs for termination, and specifically directs state commissions not to use the termination proxies established in the Order for establishing a paging carrier's termination rates (paragraphs 1092, 1093).

Pacific's adjustments to Cook's cost study appear to be reasonable, based on the record in this proceeding. Therefore, on an interim basis, we will accept Pacific's adjusted cost figure, 0.088 cents per page, based on an appropriately sized paging terminal, to set the termination rate. Pacific will pay the same rate to Cook regardless of whether the traffic is sent over a Type 2A (tandem) or a Type 1 connection.

We emphasize that these rates are interim. Therefore, we will keep this proceeding open to take further evidence to set a forward looking compensation rate which is consistent with our consensus costing principles. The assigned arbitrator will issue an ALJ ruling to set out a schedule for the second phase of the proceeding.

3.6 Rejection of Arbitrated Agreement and Filing of Agreement Consistent with the Terms of This Decision

For the reasons discussed, the arbitrated agreement does not meet the requirements of Sections 251(b)(5) and 252(d)(2). We therefore reject the agreement, and direct the parties to submit a new agreement that provides compensation to the applicant for its transport and termination of calls.

At the direction of the arbitrator, both parties previously presented a "dueling clause" agreement with sections that would be included or deleted as a consequence of the outcomes of the Arbitrator's Report (Ex. 20). We direct the parties to use that "dueling clause" agreement to file a new agreement that complies with the findings in this decision. In the dueling clause

agreement, compensation for use of local paging interconnection facilities (Section 3.2 of the agreement) depended upon the basis for our finding. To clarify our position, we find that Cook is not entitled to reciprocal compensation pursuant to the terms of the Pac-West agreement. Therefore, the alternate language for Section 3.2 which determines that Cook is entitled to reciprocal compensation on terms other than those in the Pac-West agreement, should be adopted. The resulting section 3.2 provides for the recurring facilities charges to be apportioned between the parties based on the each party's relative amount of originating traffic sent over those facilities. Consequently, Cook will not be assessed recurring charges for the facilities.

Findings of Fact

1. Applicant is a one-way paging company.

2. Applicant terminates traffic that originates on the respondent's network and provides termination of telecommunications.

3. Applicant incurs costs for terminating traffic that originates on the respondent's network.

4. The Pac-West agreement was not approved under the Act.

5. Applicant does not provide the same service as PacWest.

6. No public policy objectives are met by denying compensation to applicant for the cost of terminating calls that originate on respondent's network.

7. Cook submitted a cost study that estimates the termination cost as 2.4 cents per page.

8. Cook requests the termination rates negotiated between Pacific Bell and Pac-West Telecom in Advice Letter 18115. Under those terms, Cook would be compensated at aproximately 0.95 cents per page.

9. We have no evidence in this case that the rates adopted in the Pac-West agreement with Pacific are based on cost.

10. Cook's cost study does not comply with our consensus costing principles established in D.95-12-016.

11. Cook's cost study includes costs for the paging terminal, the paging transmitters, and the facilities that connect them.

12. Cook's cost study includes costs for features that can be used for non-paging service.

13. Cook's cost study includes costs for equipment that can be used for other purposes than terminating Pacific-originated traffic.

14. Based on the record in this proceeding, Pacific's adjustments to Cook's cost study are reasonable to set rates on an interim basis.

15. Pacific makes adjustments to Cook's cost study to arrive at a cost ranging from 0.006 to 0.088 cents per page depending on the paging terminal selected and the capacity assumptions employed.

Conclusions of Law

1. Congress' intent in providing mutual compensation under the Act was to ensure that carriers that historically had not been compensated for terminating calls originating on the local exchange carrier network henceforth be compensated.

2. Paying compensation to one-way paging companies for terminating traffic is consistent with the Telecommunications Act of 1996, as well as FCC orders and regulations implementing the Act.

3. Cook's arguments did not convince us to adopt the termination rates negotiated by Pacific Bell and Pac-West Telecom nor those established in arbitrations between Pacific and wireline CLCs as reasonable approximations of Cook's additional costs of termination.

4. Pacific's cost estimate of 0.088 cents per page should be adopted as the rate for compensation to Cook for local termination on an interim basis.

5. Pacific's refusal to pay compensation on Type 1 connections is unreasonable because Cook still incurs termination costs at its paging terminal.

6. Pacific shall pay the same compensation to Cook for local termination regardless of whether the parties are interconnected by a Type 1 or Type 2A connection.

7. Cook should only be entitled to compensation for its paging terminal costs which, for the purposes of this arbitration, should be considered an equivalent facility to an end office switch.

8. Based on the facts in this arbitration, Cook is not currently entitled to compensation for transport. However, if and when Cook owns facilities that connect from a Pacific Bell end office or tandem to a Cook Paging Terminal, then Cook will be entitled to compensation for transport.

9. The Interconnection Agreement between Cook Telecom, Inc. and Pacific Bell should be rejected because it is inconsistent with the Act.

10. A new agreement should be submitted that conforms with this decision.

11. This order should be effective today.

O R D E R

IT IS ORDERED that:

1. Pursuant to the Telecommunications Act of 1996, the "Conformed Interconnection Agreement Between Cook Telecom, Inc. And Pacific Bell (U 1001 C)," dated and filed April 28, 1997, is rejected.

2. The parties shall jointly file, within 10 days of the date of this order, the Interim Conformed Interconnection Agreement in the formats described in Ordering Paragraph 5 below. The parties shall base their agreement on the "dueling clause"

agreement (Exhibit 20) and make the following changes to that agreement:

a. The sections of the conformed agreement shall reflect our determination that Cook is entitled to reciprocal compensation.

b. Section 3.2 of the agreement shall reflect our determination that Cook Telecom, Inc. is not entitled to the terms of the Pac-West agreement.

c. The termination compensation rate in the pricing Schedule in Attachment III shall be as follows:

0.088 cents per Local Paging Call

3. The agreement as described in Ordering Paragraph 2 above shall become effective when filed.

4. The assigned arbitrator shall issue a Ruling to establish a procedural schedule for the establishment of final rates for local transport and termination.

5. The parties shall submit the Interim Conformed Interconection Agreement to the Commission's Administrative Law Judge Division on electronic disk in hypertext markup language format. Further, within 10 days of the date of this order, Pacific Bell shall enter the Conformed Interconnection Agreement in its world wide web server, and provide information to the Administrative Law Judge Division Computer Coordinator on linking the Conformed Interconnection Agreement on Pacific Bell's server with the Commission's web site.

6. This proceeding shall remain open to set final rates for local transport and termination.

This order is effective today.

Dated May 21, 1997, at Sacramento, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
RICHARD A. BILAS
Commissioners

I dissent.

/s/ JOSIAH L. NEEPER
Commissioner

1997 Minn. PUC LEXIS 118 printed in FULL format.

In the Matter of the Petition of AT&T Wireless Services, Inc. for Arbitration of an Interconnection Agreement with U S WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b)

DOCKET NO. P-421/EM-97-371

Minnesota Public Utilities Commission

1997 Minn. PUC LEXIS 118

July 30, 1997

PANEL:
[*1] Edward A. Garvey, Chair; Joel Jacobs, Commissioner; Marshall Johnson, Commissioner; Don Storm, Commissioner

OPINION:
ORDER RESOLVING ARBITRATION ISSUES

PROCEDURAL HISTORY

On October 3, 1996, AT&T Wireless Services, Inc. (AWS) served U S WEST Communications, Inc. (USWC) with a request to negotiate under the Telecommunications Act of 1996, 47 U.S.C. § 251. The parties failed to reach an agreement on the issues subject to negotiation.

On March 7, 1997, AWS petitioned the Commission for arbitration of all unresolved issues pursuant to the Act.

On April 17, 1997, the Commission issued its ORDER GRANTING PETITION, ESTABLISHING PROCEDURES FOR ARBITRATION. This Order referred the arbitration between AWS and USWC to the Office of Administrative Hearings (OAH) for a contested case hearing before an Administrative Law Judge (ALJ). The Commission's Order limited party intervention in the proceeding to the Minnesota Department of Public Service (the Department) and the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG) OAG/RUD. The Department and the RUD/OAG subsequently intervened in the proceeding.

The arbitration hearing began on May 6, 1997 [*2] and continued on May 7, 1997. The arbitration record closed on May 23, 1997, when reply briefs were received.

On June 6, 1997, the ALJ issued the Arbitration Decision in this matter. AWS and USWC filed exceptions on June 11, 1997.

On June 30, 1997, the Commission heard oral argument by the parties and on July 2, 1997, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

I. Preliminary Matters

A. Administrative Notice

Minn. Stat. § 14.60, subd. 4 provides:

Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified in writing either before or during hearing, or by reference in preliminary reports or otherwise, or by oral statement in the record, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence in the hearing record.

Pursuant to this statute, the Commission will take administrative notice of the stayed rules in Appendix B of the FCC [*3] order, as well as the related explanatory paragraphs in the First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98. The Commission has given notice at the hearing on this matter that it intends to do this and has given parties an opportunity to respond in oral argument. Certain portions of the order have already been made a part of the record of the arbitration.

As a result of its action in taking administrative notice of the items noted, the FCC methodologies have become part of the record in this matter and the Commission considers them as it would other evidence in the case.

B. Clarifying the Effect of the Stay

The Commission has no legal obligation to apply the methodologies, proxies or other directives contained in the stayed portions of the FCC's order. However, most of the FCC order has not been stayed and the Commission may not disregard these portions on the basis that it finds them illegal or unconstitutional.

The Commission, unlike a court, does not have the authority to declare a statute unconstitutional on its face. Neeland v. Clearwater Hospital, 257 N. W. 2d 366, 368 (Minn. [*4] 1977). Likewise, the Commission does not have the authority to declare a federal rule invalid. The federal courts of appeals have exclusive jurisdiction

. . .to enjoin, set aside, suspend (in whole or part) or to determine the validity of...all final orders of the Federal Communications Commission made reviewable by section 402 (a) of title 47.

28 U.S.C. § 2342 (1).

While the Commission has challenged the statutory authority of the FCC to regulate the pricing of intrastate telephone services, it has done so properly by intervening in a lawsuit before a federal court of appeals, not by declaring portions of the rule invalid.

C. Burden of Proof

In its April 17, 1997, ORDER GRANTING PETITION, ESTABLISHING PROCEDURES FOR

ARBITRATION in this matter, the Commission determined that USWC has the burden of proof in these proceedings. The Commission stated:

The burden of proof with respect to all issues of material fact shall be on U S WEST. The facts at issue must be proven by a preponderance of the evidence. The ALJ, however, may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute.
[*5]
The Commission's decision is consistent with the FCC's August 8, 1996 Order in CC Docket No. 96-98 in which the FCC specifically established a proof standard of clear and convincing evidence applicable to local exchange companies (LECs) who would deny an entrant's request for a method of achieving interconnection or access to unbundled elements.

The explicit placement of the burden of proof on U S WEST by the Commission and the FCC acknowledges that USWC and other LECs have a monopoly, not only over the local exchange network but also over information about the network that is needed to make major decisions in this proceeding.

D. Agreements Subject to Modification, Commission Approval

The agreements arbitrated in this proceeding may need to be modified in the future for several reasons. First, the parties may continue to negotiate as the states make their decisions. Second, some decisions may have to be made on an interim basis subject to later amendment in future proceedings. These future FCC and Commission decisions, including rulemakings, may need to be incorporated in these agreements. Indeed, the FCC Rules indicate that a party violates the duty under the Act to negotiate [*6] in good faith if it refuses

. . . to include in an arbitrated or negotiated agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules.

47 CFR § 51.301 (c)(3).

Therefore, the Commission hereby clarifies that the agreements it approves in this Order are subject to modification by negotiation or by future Commission direction. Any future modifications or amendments should be brought to the Commission for approval.

E. Timeframe for Reconsideration and Final Contract Language

Minn. Rules, Part 7829.3000, subp. 1 establishes a 20 day timeframe for filing petitions for reconsideration. The Commission believes that a shorter timeframe is desirable in this case to act efficiently to promote the goals of the Federal Telecommunications Act. In considering whether a variance to allow parties to file a petition for rehearing or reconsideration within 10 days of the issuance of the Order is appropriate, the Commission notes that it may vary its rules pursuant to Minn. Rules, Part. 7829.3200 when:

. enforcement of the rule would impose an excessive burden upon the applicant or others affected by the [*7] rule;

. granting the variance would not adversely affect the public interest; and

. granting the variance would not conflict with standards imposed by law.

Applying these standards, the Commission finds that granting such a variance is warranted and will do so. First, varying the time frame for petitions for reconsideration from twenty days to ten will not impose an excessive burden upon the parties to this proceeding as it provides parties sufficient time to prepare their petitions and allows adequate time for the Commission to carefully and thoughtfully analyze the petitions for reconsideration. It will also allow the Commission to act efficiently to promote the goals of the Federal Act. Second, varying the time frame for the filing of petitions for reconsideration will not adversely affect the public interest, but instead will allow an orderly, efficient processing of this matter. Third, granting the variance would not conflict with standards imposed by law.

The Commission notes that it is not changing the 10 day time period allowed for answers to petitions for reconsideration. Minn. Rules, Part. 7829.3200, subp. 4.

Since the Commission desires to coordinate consideration [*8] of the final contract language with its review of the petitions for reconsideration, this Order will give the parties 30 days from the issuance of this Order to file final contract language. Interested parties and participants will have 10 days to file comments on the submitted final contract language.

II. Disputed Issues: Analysis and Action

A. Bill & Keep

Under 47 U.S.C. § 251(b)(5), each LEC has the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. "Bill & Keep" is a compensation agreement where two interconnected carriers terminate each others traffic without billing each other. This method reduces the use of resources devoted to measuring traffic and billing.

1. AWS

AWS proposed that the companies be allowed to "bill & keep" in this case because, it argued, the amount of compensation to be exchanged between parties will be "equivalent". AWS explained that although the traffic between AWS and USWC is substantially unbalanced, AWS' higher costs to terminate traffic (more than 4 times USWC's cost) mean that in net, the dollar value of the compensation owed each other may be in balance.

AWS asserted [*9] that USWC has not presented any evidence regarding its own costs or AWS' costs, while AWS has provided evidence to indicate that its costs are substantially higher that the costs of USWC. AWS stated that it is prepared to waive full cost recovery to gain the advantages of "bill & keep".

2. USWC

USWC argued that the Commission should reject "bill & keep" as a compensation mechanism for transport, termination, and transit. USWC stated that the FCC

concluded that bill & keep could be imposed by a state only if traffic is roughly balanced in two directions, is expected to remain so, and neither carrier has rebutted the presumption of symmetrical rates. USWC stated that traffic flows between it and AWS will rarely, if ever, reflect a stable pattern of balanced traffic because AWS will choose to serve particular types of customers and will target non-random groups, while USWC must serve all comers. USWC noted that in many of its existing agreements with CMRS providers the traffic is significantly unbalanced, e.g. land-to-mobile traffic is typically less than 25 percent of total traffic.

3. The Department

The Department recommended that "bill & keep" be rejected as a compensation [*10] mechanism for transport and termination. The Department rejected AWS' and USWC's cost studies as unreliable. The Department noted that AWS' evidence was extremely sketchy and USWC's cost studies were seriously flawed. Furthermore, the Department argued that the record is unclear as to what degree traffic between the parties is out of balance. Given the uncertainty regarding actual costs and actual traffic flows, the Department did not believe there is enough evidence to find that "bill & keep" will fully compensate both parties.

4. The ALJ

The ALJ did not explicitly address the issue of "bill & keep" but did make an explicit recommendation regarding the prices to be implemented in this proceeding. It appears that the ALJ's decision to recommend prices implies that it is not recommending "bill & keep".

5. Analysis and Action

Under 47 U.S.C. § 252(d)(2)(A) reciprocal compensation is not just and reasonable unless it

. . . provides for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and [*11] conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

Given the uncertainty regarding actual costs and actual traffic flows, the Commission does not believe there is enough evidence in this record to find "bill & keep" will compensate both parties. Therefore, the Commission finds that "bill & keep" is not an appropriate compensation mechanism for transport, termination, and transit.

B. Interim Prices

All parties and the ALJ agreed that permanent rates for exchange of traffic should not be set in this proceeding and should be set in the Commission's generic cost docket (P-442, 5321, 3167, 466, 421/CI-96-1540). At issue here is what interim rates will be established that will be subject to a true-up when permanent rates are set in the generic cost docket.

1. AWS

AWS sponsored proposed interim rates based on its modification of a USWC cost study, making adjustments to the cost of capital and depreciation rates. AWS proposed the following interim rates based on the cost study it submitted in this proceeding:

Type 2B (end office termination)	$ .0025 per minute of use
Type 2A (tandem switching and transport)	$ .0020 per minute of use
Transit (tandem switching and transport)	$ .0020 per minute of use

[*12]

2. USWC

USWC proposed two alternatives for interim prices:

1. The rates set in the March 1, 1994, agreement between the parties:

Type 2B (end office termination)	$ .0206 per minute of use
Type 2A (tandem switching and transport)	$ .0245 per minute of use
Transit (tandem switching and transport)	$ .0245 per minute of use

or

2. The interim rates set in the U S WEST Consolidated Arbitration docket:

Type 2B (end office termination)	$ .00260 per minute of use
Type 2A (tandem switching and transport)	$ .00556 per minute of use
Transit (tandem switching and transport)	$ .00556 per minute of use

3. The Department

The Department stated that neither party has submitted sufficient information to determine permanent rates for transport and termination. According to the Department, USWC has not supported the use of any cost study including the study it provided to AWS at AWS' request.

The Department noted that the cost study relied on by AWS on this subject is not based on TELRIC principles and was rejected in the Consolidated Arbitration. The Department further stated that AWS' modification of the USWC cost study is not sufficient to make that study [*13] appropriate.

The Department recommended that the Commission adopt the interim rates determined in the Consolidated Arbitration docket at this time and establish permanent rates with the guidance of the USWC's Generic Cost docket. The Department further recommended that the interim rates which would prevail at the conclusion of this proceeding, through to the conclusion of the Generic Cost docket, should be subject to true-up as was ordered in the Consolidated Arbitration.

4. The ALJ

The ALJ stated that it is appropriate to adopt as interim rates in this

proceeding the interim rates for transport and termination ordered by the Commission in the Consolidated Arbitration Proceeding. The interim rates should prevail from the conclusion of this proceeding to the conclusion of the generic cost docket. The interim rates should be subject to true-up based on the permanent rates established in the Generic Cost proceeding.

5. Commission Action

Section 252(b)(4)(A) of the Act states:

The State commission shall limit its consideration of any petition under paragraph (1) [Arbitration.] ... to the issues set forth in the petition and in the response, if any, filed under paragraph [*14] (3).

Since the cost studies supporting the rates set in the USWC Consolidated Proceeding are not part of the record in this proceeding, they may not be relied on as the best evidence available. Those rates were based on Hatfield 2.2.2 which is not part of the record evidence.

The contract rates in the March 1994 contract between USWC and AWS were approved by the Commission in 1994. However, these rates were not cost-based and were approved under a different regulatory structure. As such, they are unsuitable for adoption as interim rates in this case.

As between USWC's cost study as is and its cost study as modified by AWS, the Commission finds that USWC's unmodified cost study is preferable because the Commission has approved the 13-year depreciation life used in that study. Hence, the Commission finds that the best evidence in the record is USWC's unmodified cost study.

The resulting rates are:

End Office Termination:	.001994
Tandem & Transport:	.001114
End Office Termination and Tandem & Transport:	.003108
Transit:	.001114

These rates do not include an amount of depreciation reserve deficiency (.00130), as originally requested by USWC. USWC subsequently withdrew [*15] its request to recover the depreciation reserve deficiency in the rates set in this Order, stating that the depreciation reserve deficiency should be established for all ILECS in a separate study. In these circumstances, the Commission finds that the absence of an amount of depreciation reserve deficiency in the rates established in this Order do not render such rates unreasonable. In so finding, the Commission is not determining that the rates ultimately adopted as a result of the generic cost proceeding will or will not contain an amount of depreciation reserve deficiency. The Commission notes, however, that depreciation reserve deficiencies have never been approved by this Commission.

C. Compensation to AWS From Third Party Carrier

The parties could not agree on what termination charges would be owed to AWS by

third party carriers for calls originating with a third party carrier, transiting U S WEST's network, and terminating on AWS' network. Nor could the parties agree on USWC's role in facilitating the collection of these charges by AWS in the interim period when AWS has not developed agreements with third party carriers.

1. AWS

AWS argued that until it can arrange [*16] agreements with third party carriers, USWC should not bill or collect termination charges for carriers using its facilities for transited traffic unless those carriers have a reciprocal arrangement themselves. According to AWS, third party carriers and AWS should originate and terminate their own traffic vis-a-vis each other, on a "bill & keep" basis.

2. USWC

USWC asserted that it is not responsible for the monetary arrangement between originating and terminating carriers. USWC argued that it is not required to negotiate transiting arrangements and to bill for them on behalf of AWS and that AWS' relationships with third party carriers have nothing to do with this proceeding between USWC and AWS.

3. The Department and the ALJ

Neither the Department nor the ALJ commented on this issue.

4. Commission Action

The Commission finds that it is consistent with the Act that USWC be required to make its recording and billing services available to AWS to facilitate AWS' collection of termination charges owed it by third party carriers. Of course, if AWS does use USWC's recording and billing services it must compensate USWC at a reasonable rate.

D. Compensation for Traffic [*17] Terminated at AWS' MSCs

The parties could not agree whether AWS should be compensated for its Mobile Switching Center (MSC) at the same rate USWC is compensated for its tandem switch or at the lower, end office rate.

1. AWS

AWS argued that it should be compensated at the higher tandem switch rate for use of its MSCs. AWS stated that its MSC can and does terminate calls to any physical location to which USWC's tandem can terminate calls and performs functions remarkably similar to a USWC tandem switch.

AWS referred to the Commission's decision in the Consolidated Arbitration where the Commission stated that competing local exchange company (CLEC) switches perform the same function as the incumbent's tandems in that they both route and carry the calls of the other carrier's subscribers. AWS argued that there is no demonstrable difference between a CLEC switch, AWS' MSC, and USWC's tandem.

2. USWC

U S WEST's position is that AWS' switched network does not perform a tandem switching function and, therefore, does not qualify for higher tandem switching rates. USWC argued that AWS' switch functions as an end office switch, that AWS provides only a single switching function, [*18] and that AWS does not incur the costs that USWC does in performing two switching functions.

USWC also rejected AWS' argument that USWC should pay tandem rates, as opposed to end office rates, simply because AWS claims to have higher costs. The key factor, according to USWC, is that AWS' MSC does not perform a tandem function, that even though AWS may employ an IS41 Tandem switch, that equipment is not used to perform a tandem switching function.

3. The Department

The Department supported the position taken by AWS, that AWS's MSCs should receive compensation at the tandem switch rate. Citing the FCC Order at Paragraph 1090, Department stated that state commissions are directed to consider the functionality and the geographic area to be served by a competitor's switch in comparison to the LEC's switch. The Department noted that AWS' MSC switches appear to function in both end office and tandem capacities, that AWS' cell site control switch and cell sites work together to perform end office functions. Additionally, the Department noted that AWS' MSCs perform transit functions by routing calls to other wireless carriers.

4. The ALJ

The ALJ noted that Paragraph 1090 of the [*19] FCC's First Order directs that states consider the functionality and geographic area to be served by a competitor's switch in comparison to the LEC's switch. The ALJ found that AWS' MSC switches appear to function in both end office and tandem capacities, that AWS' cell site control switch and cell sites work together to perform end office type functions, and that AWS' MSCs perform transit functions by routing calls to other wireless carriers to complete the roaming calls of its customers. The ALJ further noted that by virtue of the MSCs' technical capabilities and interconnections with other networks and AWS's roaming agreements with other wireless carriers, AWS subscribers can place and receive calls for out-{state} Minnesota. The ALJ concluded, therefore, that AWS' MSCs are comparable to USWC's tandem switches and, as such, warrant compensation at USWC's tandem rate for USWC traffic terminated at AWS's MSC.

The ALJ expressed surprise that several other State Commissions have determined that a wireless network does not qualify to be compensated at the tandem rate, in light of the quantum of proof imposed on a LEC on this type of issue and the Act's focus on competition and accommodation [*20] to new technologies. In any event, the ALJ noted, the Minnesota Commission addressed this issue as it relates to Minnesota competing local exchange carriers who do not have wireless networks in the Consolidated Arbitration Proceeding Order. See Order, pages 70-72. In that Order, the Commission stated that it was inappropriate to focus on "certain technical and functional differences between U S WEST's tandems and typical CLEC switches". The ALJ stated he was unpersuaded that the technical differences between AWS's MSC warrants treating AWS's MSC like a USWC end office and concluded that USWC failed to prove that the difference justifies different

compensation in rates.

5. Commission Analysis and Action

Paragraph 1090 of the FCC's Order states, in part:

States shall also consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area [*21] comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate. (emphasis added.)

The Commission has considered the functionality and geographic factors cited by the FCC and concludes that some but not all of the calls terminating on AWS' network should be priced at the same rate USWC is compensated for its tandem switch.

All the parties and the ALJ acknowledged that AWS' MSC switches function in end office capacities for some calls and in tandem capacities for others. The Commission finds that actual performance of the switch on a given call, rather that the capacity to perform with respect to that call is the critical question. n1 The Commission finds, therefore, that it would be appropriate to compensate AWS at the higher tandem rate for calls that require its switch to perform tandem switching functions and to be compensated at the lower end office rate for calls that simply require end office function.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 If the FCC paragraph meant that all calls terminated on a switch that had the capacity to perform tandem switch functions should be compensated at the tandem switch rate, the FCC's reference to the Commission determining whether "some or all" of the calls should be so compensated would have no meaning. To give meaning to the "some or all" language, actual performance of the switch on an given call, rather than abstract capacity to perform, is the key to the rate at which the terminating switch function should be compensated on such a call.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*22]
The Commission will direct USWC to work out, in conjunction with AWS, an appropriate means to identify the functions actually performed with respect to the USWC calls terminated at AWS's MSC and to compensate AWS accordingly.

E. Access Charges for Intra-MTA n2 Roaming Calls

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 MTA refers to the Major Trading Area, which is the geographical area considered by the FCC to be the local calling area of a CMRS provider, such as AWS. Roaming areas are much smaller geographic areas defined either by the signal reach of a cell site or by marketing practices which may aggregate

several cell sites into a single roaming area for billing purposes. As such, a CMRS subscriber may make a call within the MTA, that is subject to roaming charges, and that crosses a state boundary.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The Major Trading Area (MTA) is the geographical area considered by the FCC to be the local calling area of a CMRS provider, such as AWS. The MTA relevant to AWS in this proceeding covers a large area: almost all of Minnesota, all of North Dakota, over [*23] half of South Dakota, a significant portion of Wisconsin, and a small portion of Iowa. The parties could not agree on the compensation for calls that 1) originate and terminate within the MTA and 2) cross state boundaries.

1. ASW

AWS asserted that the MTA is the appropriate definition of its local service area and, as such, calls originating and terminating within the MTA should be subject to transport and termination charges, not interstate or intrastate access charges.

2. USWC

USWC argued that intra-MTA traffic that transits interstate facilities is subject to interstate access charges and that AWS should be responsible for identifying such traffic. USWC argued that it charged AWS access charges under the 1994 pre-existing agreement and, therefore, it is entitled to continue to collect those charges. USWC claimed that under the pre-existing agreement access charges were not differentiated, but were included in a single "blended rate" that included toll charges. USWC asserted that it is unnecessary to find that access charges were explicitly delineated under the pre-existing contract in order to find that the current payment of charges by AWS is appropriate.

3. The [*24] Department

The Department cited Paragraph 1043 of the FCC Order to show that the FCC seeks to maintain the status quo ante with respect to access charge payments for interstate roaming traffic. The Department argued that USWC has not met its burden of proof on this issue, i.e. that it has not provided evidence that it has been collecting interstate access from AWS in the past under the parties' 1994 agreement. Therefore, the Department argued, USWC is not entitled to collect interstate access charges with respect to intra-MTA roaming calls.

4. The ALJ

The ALJ recommended that USWC not be allowed to assess AWS interstate access charges for intra-MTA roaming. The ALJ noted that Paragraph 1043 of the FCC's First Order specifically refers to interstate roaming traffic, and states in part:

...the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS can continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges.

Based on this language, the ALJ concluded that the FCC is seeking to maintain [*25] the status quo ante with respect to access charge payments for interstate roaming traffic. The ALJ found that USWC has failed to prove that AWS' originating intra-MTA roaming traffic was subject to access charges prior to the FCC's First Order and therefore was not entitled to apply such charges to such traffic now.

5. The Commission's Analysis and Action

In the Commission's view, the FCC Order (Paragraph 1043) seeks to maintain the status quo ante regarding intra-MTA roaming charges. The Commission finds that USWC has failed to prove that such traffic was subject to interstate access charges prior to the FCC's Order. Therefore, the Commission concludes that USWC must not assess AWS interstate or intrastate access charges for intra-MTA roaming traffic.

F. Compensation for Terminating Paging Calls

The parties could not agree whether AWS was entitled to receive compensation from USWC for terminating paging calls originating in USWC's service area.

1. AWS

AWS argued that it is entitled to be compensated for the termination of paging traffic originated by USWC, and that AWS need not compensate USWC for facilities used to deliver such calls because USWC is the originator [*26] of such calls. Regarding USWC's claim that AWS has the duty to provide reciprocal compensation, AWS references Paragraph 1008 of the Order which states, in part:

Accordingly, LECs are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks, ...

AWS also cited Paragraph 1092 of the Order which states, in part:

Paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, and should not be required to pay charges for traffic that originates on other carriers' networks ...

2. USWC

USWC argued that AWS is not entitled to receive compensation from USWC for terminating paging calls originating in USWC's service area. USWC acknowledged that the duty to provide reciprocal compensation for transport and termination arises under § 251(b)(5) but argued that reciprocal compensation is inappropriate for AWS' paging services because paging services are one-way communication, i.e. no [*27] calls originate on AWS' facilities to be terminated by USWC.

3. The Department

The Department agreed with AWS. The Department contended that it has seen no legal authority offered in this proceeding to permit the ALJ to depart in this instance from the general rule that each party pays for calls originating on their own network (Initial Brief, pp. 16-17). Referencing the FCC First Report and Order, Paragraphs 1008, 1042, and 1092, the Department argued that (i) paging providers are considered to be telecommunications carriers, (ii) LECs are prohibited from charging paging providers for calls originating on other carrier's networks, and (iii) parties that terminate page calls must be compensated by the company upon whose network the page call originated.

4. The ALJ

The ALJ recommended that AWS not be required to pay for the termination of any USWC originated calls through direct termination charges. The ALJ found that AWS is allowed to charge for the termination of USWC originated paging calls based on the outcome of the FCC's future review of this issue that is provided under the FCC Order.

5. Commission Analysis and Action

Paging providers are defined in the FCC [*28] Order as "telecommunications carriers," and under the Act, all telecommunications carriers are entitled to reciprocal compensation from incumbent LECs. (47 U.S.C. § 251(b)(5)). The FCC Order states the rule clearly:

Accordingly, LECs are obligated, pursuant to section 251(b)(5) and the corresponding pricing standards of section 252(d)(2), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks, ... (FCC Order, P 1008)

The FCC has reiterated this rule as follows,

Paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, ... (FCC Order, P 1092).

The Commission finds no exclusion in the Act or the FCC Order that would prevent application of the clear rule that AWS should be compensated by USWC for terminating paging calls originating in USWC's service area.

G. Dedicated Paging Facilities

The parties could not agree whether AWS should be required to pay for facilities required to connect AWS' dedicated paging facilities to USWC's network.

1. AWS

With respect [*29] to charges for paging facilities, AWS relied on paragraphs 1092 and 1042 which state, respectively, in part as follows:

Paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, and should not be required to pay charges for traffic that originates on other carriers'

networks ...

and

We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic. As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.

AWS argued that by trying to impose facilities charges on AWS, as it has done in the past, USWC is trying to circumvent this rule.

2. USWC

USWC proposed that AWS should be required to pay for facilities required to connect AWS' dedicated paging facilities to USWC's network. USWC noted that Southwestern Bell requested clarification from the FCC regarding its rules for interconnection between LECs and paging carriers and that on May [*30] 22, 1997, the FCC established a pleading cycle to receive comments on Southwestern Bell's request. USWC asked that any Commission decision should be designed to accommodate later action by the FCC.

3. The Department

The Department stated that no legal authority has been offered in this proceeding that would justify permitting the ALJ to depart from the general rule that each party pays for calls originating on their own network. The Department argued that USWC benefits from the facilities used to transport paging traffic because those facilities permit USWC's customers to place paging calls. Additionally, the Department noted that paging calls that originate from USWC customers generate return calls to USWC's network for which USWC is compensated for termination.

4. The ALJ

The ALJ recommended that the AWS should not be required to pay USWC for any usage of facilities associated with the delivery of paging services. The ALJ noted that the FCC expressly prohibits the imposition of charges as they had been applied in the past, stating at Paragraph 1042 of its Order:

We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently [*31] impose on CMRS providers for LEC-originated traffic. As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge. (FCC Order, Paragraph 1042) (emphasis added).

The ALJ cited Paragraph 1042 of the FCC Order and stated that the requirement that paging providers be compensated for the termination of LEC-originated traffic similarly requires that they not be charged for the facilities used to deliver such traffic. Consequently, the ALJ reasoned, the facilities used for the delivery of such traffic must also be paid for by USWC.

5. The Commission's Analysis and Action

The FCC Order Paragraph 1042 quoted above clearly states that incumbent LECs must provide traffic to the CMRS provider without charge. FCC Rule § 51.703 (stay lifted) states:

A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.

As a result, the Commission finds that AWS is not required to compensate U S WEST for the facilities used to deliver [*32] paging traffic to AWS' paging network.

H. Effective Date for Reciprocal Compensation

The parties agree that reciprocal compensation is required by FCC rules, but disagreed as to the date when reciprocal compensation should begin.

1. AWS

AWS argued that the effective date for reciprocal compensation should be October 3, 1996, the date when AWS submitted its request for interconnection to USWC.

2. USWC

USWC argued for a November 1, 1996 effective date because that was the day the 8th Circuit Court lifted the stay of the FCC rules.

3. The Department

The Department argued that the effective date should be October 3, 1996. The Department argued that in lifting the stay, the Court determined that incumbent LECs, such as USWC, were not entitled to protection from FCC rule 51.717. Consequently, the Department reasoned, USWC should not receive a benefit that the Eighth Circuit has determined the Company is not entitled to have.

4. The ALJ

The ALJ recommended an October 3, 1996 effective date. The ALJ reasoned that an order of an administrative agency, such as the FCC, that is initially stayed and then allowed to go into effect is effective as of its initial issuance [*33] date. The ALJ noted although the Eighth Circuit Court of Appeals temporarily stayed the effectiveness of FCC Rule 51.717(b), the Court lifted the stay on November 1. Thus, the Rule went into effect permitting reciprocal compensation from the original submission of an interconnection request. In this case, the ALJ found, lifting of the temporary stay rendered the Rule effective on October 3, the day AWS submitted its request for interconnection.

The ALJ stated that if AWS does not receive reciprocal compensation from the original effective date of the FCC Order, AWS will be denied the benefit which it had been unjustly restricted from receiving due to the erroneous entry of a stay.

5. Commission Action

The Commission is persuaded by the arguments presented by AWS, the Department and the ALJ and finds that the effective date for beginning reciprocal compensation is October 3, 1996.

I. Rates Pending Order

The parties disagreed over the level of reciprocal compensation rates should apply between the commencement of reciprocal compensation until an Order is issued in this proceeding.

1. AWS

AWS argued that the March 1994 contract expired on December 31, 1996, so the [*34] contract rates set by that contract cannot be used for reciprocal compensation. AWS stated that the Amendment (Exhibit 14) provides for a true-up for the remaining months of 1996 after the 1994 contract expires and the Interim Agreement (Exhibit 13) provides for a true-up for the period beginning January 1, 1997, to the "results" of this arbitration.

2. USWC

USWC argued that the March 1994 contract contained an "evergreen clause" which provided that after December 31, 1996, the contract would remain in effect on a month by month basis until written notice was given by one of the parties. USWC claimed that the Exhibits relied on by AWS clearly indicate that the parties contemplated that the March 1994 contract would remain in effect until the resolution of the dispute through negotiation and/or arbitration. USWC characterized the good faith lump sum payments (provided for in the Amendment and the Interim Agreement) as an expedient to allow the parties to continue their business relationship without interruption of service.

3. The Department

The Department took no position on whether the subsequent agreements between the parties have supplanted the March 1994 agreement but [*35] noted that the 1994 rates should prevail unless the Commission determines that the amendment and interim agreements are binding.

4. The ALJ

The ALJ found that the record did not conclusively establish whether that agreement was terminated on December 31, 1996 or continued in effect after this date. To determine the intention of the parties, the ALJ applied that parole evidence rule and considered the language contained in the pertinent agreements, Exhibits 13, 14 and 15. Upon review of these exhibits, the ALJ concluded that the 1994 contractual relationship between the parties continued and that the parties intended to clarify compensation issues.

According to the ALJ, Exhibits 13, 14 and 15 show that AWS and USWC had substantial, dynamic disagreements over their compensation relationship and that these parties intended to change their compensation relationship. The ALJ found that USWC has failed to prove that the parties intended to continue the 1994 compensation rates after December 31, 1996. The ALJ indicated that the parties

should honor the agreements identified in Exhibits 13, 14 and 15, but noted that the exhibits focus primarily on true-ups and do not clearly state [*36] what rates apply.

5. The Commission's Analysis and Action

The question whether the parties modified the March 1994 contract is a red herring in this proceeding that the Commission will not pursue. Whether the contract terminated or not is not relevant to the Commission's decision in this proceeding. Any changes to this agreement, subsequent to AWS' request for renegotiation, are a contractual dispute between two private parties and not a matter that need concern the Commission.

FCC Rules § 51.717 set the initial reciprocal compensation rate at that rate prevailing in the pre-existing agreement until the state commission approves a different rate. The parties agree as to the rates set by their March 1994 contract and the Commission has not approved any rate agreement other than the going-forward rates set in this Order. See above at Section B on pages 6-9. The rates in existence at the beginning of reciprocal compensation were set by Commission approved tariff. No other rates have been approved by this Commission since then. Whatever the parties arranged between themselves subsequently does not alter the fact that the Commission has approved no other rates than those in the [*37] March 1994 contract.

Accordingly, the Commission will make no decision regarding the status of the parties' interim agreements (Exhibits 13, 14, and 15) and direct the parties to seek resolution of their dispute on this issue in another forum. The rates which shall prevail from the commencement of reciprocal compensation until an arbitration order is issued in this proceeding are the rates set by the parties March 1994 agreement. No true-up is warranted.

J. Pick and Choose Option

1. AWS

AWS claimed that USWC must make available to AWS any rates, terms, and conditions that have been approved in agreements between USWC and other telecommunications carriers. AWS cited Federal Act Section 251(i) as obligating USWC to make available any interconnection, service, or network element provided under an agreement approved under Section 252 to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

AWS argued that the Federal Act and FCC Rules support the interpretation that individual provisions of publicly filed interconnection agreements can be selected by a requesting carrier.

2. USWC

[*38]

USWC argued that the Commission should reject AWS' recommended pick and choose provision in this case. USWC noted that the FCC Rules and Orders allowing a pick and choose provision were stayed by the Eighth Circuit Court of Appeals. USWC further noted that in staying the rule, the Court stated that such a provision would operate to undercut any agreements that were negotiated or arbitrated.

USWC also noted that the Minnesota Commission has rejected the pick and choose rule in the Consolidated Arbitration Proceeding, Docket Nos. P-421/M-96-729, 855, 909.

3. The Department

The Department analyzed the Federal Act, FCC Rules and Orders, and the Commission's earlier decision in the Consolidated Arbitration Proceeding. The Department noted that the FCC's rules which would have permitted AWS to "pick and choose" terms from other agreements, has been stayed in Federal Court. The Department further noted that in its earlier ORDER RESOLVING ISSUES AFTER RECONSIDERATION AND APPROVING CONTRACT in Docket Nos. P-421/M-96-729, 855, 909, the Commission directed that the following language be added to the Agreement:

The Parties agree that the provisions of Section 252(i) of the Act shall [*39] apply, including final state and federal interpretive regulations in effect from time to time.

The Department recommended that this language also be required in the agreement between AWS and USWC because of the unsettled nature of the law.

4. The ALJ

According to the ALJ, the applicable law is Section 252(i) of the Act which provides:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

The ALJ noted that in 47 C.F.R. § 51.809, the FCC interpreted Section 252(i) to require local exchange carriers to make available

...any individual interconnections, service or network element arrangement contained in any agreement to which it is a party that is approved by a State Commission pursuant to section 252 of the Act, upon the same rates, terms and conditions as those provided in the agreement.

However, the ALJ also noted that on October 15, 1996, the Eighth Circuit Court of Appeals stayed 47 C.F.R. § 51.809, the so-called "pick [*40] and choose" rule at issue. Accordingly, the ALJ recommended that the parties include in their agreement a recognition that the law on this issue is unsettled, as was ordered in the Commission's March 17, 1997 Order after reconsideration in the Consolidated Arbitration Proceeding.

5. Commission Action

For the reasons articulated above by the Department and the ALJ, the Commission finds it appropriate to direct the parties to include in their agreement language adopted by the Commission in the consolidated arbitration that recognizes the unsettled state of the law on the application of section 252(i). n3 The specific language is: